FILE COPY.

Supreme Court U. S.
FILED
DEC 31 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

N. W. SONNENBERG,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 14197

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is brought here by writ of error to the supreme court of the State of Utah (Rec., 154) to review the judgment of that court (Rec., 140) affirming the judgment and decree of the district court of the third judicial district (Rec., 39) by which the defendants (defendants in error here) were adjudged to be entitled to the possession of certain lode mining ground in the West Mountain mining district, Salt Lake county, Utah.

The suit is the ordinary form of adverse claim proceeding provided for by section 2326 United States Revised Statutes, and was brought by the plaintiff in error, Lavagnino, to determine his right to the possession of the ground embraced in the application of the defendants Uhlig and McKernan

for patent to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims. Plaintiff's adverse claim is based upon his ownership of the Yes You Do Lode claim, covering the identical ground embraced in the Uhlig No. 1 and Uhlig No. 2 locations (Rec., 12). Summons was quashed and complaint dismissed as to the defendant McKernan (Rec., 7), and the defendant Uhlig answered, denying the allegations of the complaint (Rec., 16). Subsequently, by order of court (Rec., 19), the St. Joe Mining Company was substituted for the defendant Uhlig.

The case coming on for trial, the plaintiff, Lavagnino, testified (Rec., 46) that he purchased the Yes You Do claim, on which his adverse claim was based, from one J. Fewson Smith, Jr. J. Fewson Smith, Jr., was then sworn as witness for plaintiff, and testified (Rec., 48) that he located the Yes You Do claim on January 1, 1898; that at the time of such location he was a United States deputy mineral surveyor (Rec., 49); that his location was made as a relocation of the Levi P. Lode claim (Rec., 53), and that the areas of the Yes You Do and Uhlig No. 1 and Uhlig No. 2 claims were in conflict (Rec., 54–57). Counsel for plaintiff then offered in evidence (Rec., 72–73) the location notice of the Yes You Do claim (Rec., 135) and the deed of Smith conveying said claim to him (Rec., 136). To this offer defendant objected, and objection was sustained by the court (Rec., 74) on the ground that "under the law J. Fewson Smith, Jr., the locator of the claim was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the Yes You Do mining claim," the court basing his ruling upon the construction of section 452, U. S. Rev. Stats. To this ruling plaintiff duly excepted.

For the purpose of the record plaintiff's counsel then offered to show (Rec., 74) that

> "within the time prescribed by the Federal statute, "the plaintiff filed in the United States land office a

"proper protest and adverse claim with respect to the "area in conflict between the Uhlig No. 1 Lode min- "ing claim and the Uhlig No. 2 Lode mining claim, "and the Yes You Do mining claim, and that within "thirty days of the time of filing the protest and "adverse claim, the plaintiff commenced this action. "At the time the Uhlig No. 1 and the Uhlig No. 2 "mining claims were located, that there was a "subsisting, valid location known as the Levi "P. location, and also a further subsisting valid "location known as the Veta location; that the "Levi P. location covered all of the area in "conflict between the Yes You Do and the Uhlig "No. 1 and the Uhlig No. 2 claims, and that "the necessary labor required by the United States "statute for the Levi P. claim was performed "up to and including the year 1896, and that in the "year 1897, previous to the location of the Yes You "Do, the owner of the Levi P. claim abandoned all "rights to that claim, and also performed no annual "labor or improvements upon that claim for the year "1897; and also that the Veta Lode mining claim "was located in the same year as the Uhlig No. 1 and "the Uhlig No. 2, and antecedent in point of time to "the Uhlig No. 1 and Uhlig No. 2, and covered the "discoveries of each of said claims. Also that plain- "tiff has performed the annual labor and improve- "ments required by law upon the Yes You Do min- "ing claim for the years 1899 and 1900. Also "to prove, antecedent to the time that the pro- "test and adverse claim were filed by the plain- "tiff in this action in the United States land office, "that the title had passed from J. Fewson Smith, Jr., "to the Yes You Do, to Giovanni Lavagnino, the "plaintiff in this action; that the certified copy of the "location notice offered was recorded January 3d, "1898, at 10.21 a. m. at the request of J. Fewson "Smith, Jr., in the office of J. C. Jensen, county re- "corder of Salt Lake county, and is recorded in or "described in Book G of Mining Abstracts, page 191, "and that the plaintiff and his grantor have, during "the time since the location of this claim, complied "with all the laws, rules and regulations of the United

> "States and of the State of Utah, and of the West "Mountain mining district, to entitle them to the "possession of the Yes You Do Lode mining claim, in- "cluding the conflict area between the Uhlig No. 1 "and the Uhlig No. 2 claims."

To this offer objection was made by defendants, and the court, sustaining the objection, said (Rec., 76):

> "As to the proceedings in the land office, in so far "as the claim of the plaintiff to the Yes You Do is "concerned, the court having held that the location "was void, having held that the locator, J. Fewson "Smith, was not authorized, but prohibited by the "law from making the location, and that the filing "of the adverse claim by him in the land office "would be invalid, the objection to that offer will "be sustained."

To this ruling plaintiff excepted (Rec., 77), and being precluded from introducing any further evidence to sustain the allegations of his complaint rested his case-in-chief (Rec., 77).

Evidence was then introduced on the part of defendants to show the location of the Uhlig No. 1 and Uhlig No. 2 claims on January 1, 1889, their survey and performance of annual assessment-work thereon, together with proof that the defendant The St. Joe Mining Company was the successor in interest in said claims to the defendants Uhlig and McKernan (Rec., 80–116), thus making out a *prima facie* case.

In rebuttal plaintiff produced as witness Andrew P. Mayberry, who testified as to the discovery and location by him of the Levi P. and Veta Lode claims on January 1, 1889, a few minutes after midnight, and his continued possession of said claims, with performance of annual assessment-work thereon, until December 31, 1897, when forfeited by failure to perform annual work for the year 1897 (Rec., 116–130). Plaintiff then again offered in evidence the location notices

of the Levi P. and Veta claims as showing in rebuttal of defendants' testimony as to the validity of the Uhlig locations on January 1, 1889, that the ground therein embraced was covered by valid subsisting locations on that date (Rec., 130, 133), the Levi P. location covering the area here in conflict with the Yes You Do claim, and the Veta location covering the discovery shafts of the Uhlig No. 1 and Uhlig No. 2 claims. To this objection was again made and sustained by the court over plaintiff's exception. (Rec., 130, 134). In rejecting the offered evidence of the Levi P. location certificate the trial court said (Rec., 130):

> "The view I take of the law is this: That in this "case, it stands now as though the applicants for "patent had posted their notice and diagram upon "the claims pending patent proceedings for these "claims in the land office; that the register, upon the "incoming of the proof of posting the notice and "map of the claims, published notice of the appli- "cation of these parties for patent to these claims; "that no adverse claim has been filed, though "through the peculiar conditions which have arisen "in the trial of this case, the plaintiff, who claims "to be the owner of the Yes You Do claim, also "claims that he did file an adverse claim to this "application for patent but on account of the in- "validity of the location notice of the Yes You Do "and the reason that the locator of the claim was dis- "qualified, being a deputy United States mineral sur- "veyor, and couldn't initiate any title by anything he "might do with reference to making a location of the "Yes You Do, the location notice has been rejected "as evidence. Now, that being so, the application "for a patent being unchallenged, the assumption of "the law is that the applicants are entitled to patent "their claims as applied for and third parties will not "be permitted to question the validity of the proceed- "ings to obtain patent, or make any objections, ex- "cept to show that the applicants for a patent have "not complied with the law. The Eureka case, de- "cided in the 4th Sawyer—I don't remember the

"name of it—commonly known as the Eureka case—
"in that case Judge Field held that when a party
"made an application for a patent, any adverse claim-
"ant failing to file his adverse claim within the sixty
"days' period of publication, in which he asserted or,
"rather, defined, the nature and boundaries and ex-
"tent of his adverse claim, that he would be held to
"waive it. And as no adverse claimants are before
"the court to any part or any portion of any land
"embraced within the Uhlig No. 1 and the Uhlig
"No. 2 claims as surveyed and applied for, I don't
"think the location notice of any adjoining or con-
"flicting claim could be heard to determine the right
"of the applicants to a patent in this case. And look-
"ing at the law in this way, I will rule out the loca-
"tion notice of the Levi P."

From the foregoing it will be seen that it was essential to plaintiff's case to prove (1) that on January 1, 1889, the time of the claimed location of the ground here in controversy by Edmund H. Uhlig as the Uhlig No. 1 and Uhlig No. 2 Lode claims, said ground was not unoccupied and unappropriated mineral land of the United States, because of the prior valid location thereof by Andrew H. Mayberry as the Levi P. and Veta Lode claims, the Veta location covering the discovery shafts of the Uhlig No. 1 and No. 2; (2) that said Mayberry held and possessed said ground under the Levi P. and Veta locations and in accordance with the mining laws of the United States up to and including December 31, 1897, performing the annual assessment-work thereon up to and including the year 1896; (3) that said Levi P. and Veta locations became forfeited and subject to relocation on January 1, 1898; (4) that plaintiff's grantor, J. Fewson Smith, Jr., made a valid relocation of said Levi P. and Veta claims on January 1, 1898, as the Yes You Do Lode claim, as authorized by section 2324, U. S. R. S.; (5) that plaintiff is the grantee of said Yes You Do claim under deed from J. Fewson Smith, Jr., and is the present holder and owner of said

claim under said location, deed, and the mining laws of the United States, and (6) that plaintiff duly filed in the U. S. land office at Salt Lake City protest and adverse claim to the ground in controversy within the period of publication on the Uhlig No. 1 and Uhlig No. 2 claims, bringing this action thereon within the statutory period.

The trial court, in excluding the evidence of the Levi P. and Veta locations, the location notice of the Yes You Do claim, the deed from Smith to Lavagnino, conveying the Yes You Do claim, and the evidence of filing protest and adverse claim in the local land office, absolutely precluded plaintiff from establishing his *prima facie* case, and hence rendered impossible any determination of the real issues on the merits of the case.

If Mayberry's locations of the Levi P. and Veta claims were valid and prior in time to the Uhlig locations, no valid relocations thereof could be made until Mayberry's rights or those of his grantees had come to an end. The locations by Uhlig were then made "on lands actually covered at the time by another valid and subsisting location," and hence were void (*Belk vs. Meagher*, 104 U. S., 279, 284). No subsequent acts could validate such void locations and no possessory rights or valid application for patent could be based thereon.

Not only did the rejection of the evidence of the Levi P. and Veta locations prevent any inquiry by the court as to whether the locations by Uhlig were made upon unoccupied and unappropriated ground, an essential element of the right of possession, and which being raised in issue it was the duty of the court to pass upon under section 2326, U. S. Rev. Stats., but it also excluded an essential element of plaintiff's title. As above shown, the Yes You Do claim was in express terms a relocation of the Levi P. (Rec., 135). The prior location, as well as the abandonment and forfeiture, of the Levi P. claim were therefore constituent elements of plaintiff's title to the Yes You Do claim, which he asserts

under the United States mining laws and which has been sweepingly denied by the courts below.

ASSIGNMENTS OF ERROR.

The supreme court of the State of Utah erred:

1. In holding that the location of the Yes You Do Lode mining claim by J. Fewson Smith, Jr., was invalid, because said Smith was at the time of said location a deputy United States mineral surveyor (Rec., 143, 149, 72, 74).

2. In affirming the trial court in excluding from the evidence the notice of location of the Yes You Do Lode mining claim (Rec., 149, 72, 74, 135).

3. In affirming the trial court in excluding from the evidence the deed conveying said Yes You Do Lode mining claim from J. Fewson Smith to the plaintiff, Lavagnino (Rec., 149, 73, 74, 136).

4. In affirming the trial court in refusing to permit the plaintiff to prove that he duly filed in the United States land office a protest and adverse claim in respect to the area in conflict between the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims and the Yes You Do Lode mining claim, and that within thirty days of the filing of the said protest and adverse claim plaintiff commenced this action to determine the right of possession of the area in conflict between said claims (Rec., 149, 74, 76).

5. In affirming the trial court in refusing to permit the plaintiff to prove that at the time the Uhlig No. 1 and Uhlig No. 2 claims were located there was a subsisting valid location known as the Levi P. Lode claim, and that said Levi P. location covered all of the area

in conflict between the Yes You Do and the Uhlig No. 1 and Uhlig No. 2 Lode mining claims, and in excluding from the evidence the location notice of said Levi P. Lode claim (Rec., 149, 74, 76, 130, 131, 134).

6. In affirming the trial court in rejecting evidence offered by the plaintiff to show that the necessary annual expenditure to maintain said Levi P. Lode mining claim was performed up to and including the year 1896, and that in the year 1897, prior to the location of said Yes You Do claim, the owner of said Levi P. claim abandoned all rights thereto and failed to perform any labor thereon for the year 1897 (Rec., 149, 74, 76).

7. In affirming the trial court in refusing to permit the plaintiff to prove that the Veta Lode mining claim was a valid prior location to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims, and included the discoveries of each of said Uhlig No. 1 and Uhlig No. 2 claims, and in excluding from the evidence the location notice of said Veta Lode claim (Rec., 149, 74, 76, 133, 134).

8. In affirming the trial court in refusing to permit the plaintiff to prove that he had performed the annual labor required by law upon the Yes You Do Lode mining claim for the years 1899 and 1900 (Rec., 143, 75, 76).

9. In affirming the trial court in rejecting proof offered by the plaintiff that the title of the Yes You Do Lode mining claim had passed to him from J. Fewson Smith, Jr., prior to the time of the filing of protest and adverse claim (Rec., 149, 75, 76).

10. In affirming the trial court in refusing to permit the plaintiff to prove that plaintiff and his grantor have, since the time of the location of the Yes You Do mining claim,

complied with the laws of the United States and of the State of Utah and the rules and regulations thereunder and those of the West Mountain mining district so as to entitle the plaintiff to the possession of the Yes You Do Lode mining claim, including the area in conflict between said claim and the Uhlig No. 1 and Uhlig No. 2 mining claims (Rec., 143, 75, 76).

11. In holding that the agreement between this plaintiff in error and J. Fewson Smith, Jr., was in violation of section 452 of the Revised Statutes of the United States, and that for that reason, or for any other reason, the conveyance by said Smith of the Yes You Do mining claim to plaintiff in error was invalid (Rec., 144).

12. In holding that the defendant, The St. Joe Mining Company, is entitled to the possession of the ground in conflict between said Uhlig No. 1 and Uhlig No. 2 and said Yes You Do Lode mining claims (Rec., 149, 39).

ARGUMENT.

I.

SECTION 452, U. S. REV. STATS., DOES NOT PROHIBIT THE LOCATION OF A MINING CLAIM BY A UNITED STATES DEPUTY MINERAL SURVEYOR.

Section 452, U. S. Rev. Stats., upon the construction of which the court below based its rulings, is as follows:

> "The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

This statute is manifestly in derogation or restriction of the right conferred by section 2319, U. S. Rev. Stats., on all citizens of the United States and those who have declared their intention to become such, to explore, occupy, and purchase the public mineral lands. It is, therefore, *a statute against common right*, a law denying to a special class of persons the rights or privileges conferred upon the general public, and as such must be strictly construed (*Sutherland's Statutory Construction, sec.* 366; *Endlich's Interpretation of Statutes, sec.* 341).

Adopting such strict construction of the statute, or in fact any reasonable construction thereof, we think it evident that it does not here apply.

A very careful search justifies us in saying that, with the exception of the case at bar, there is no reported decision of any court construing the above statute. The court below, however, in construing the statute as prohibiting locations or entries of public lands by United States deputy mineral surveyors, ruled contrary to the then existing and to the present construction of said statute by the Land Department. We shall hereafter review the decisions of the Land Department in detail.

The prohibition against the purchase of public lands by employees of the General Land Office is first found in the act of April 25, 1812, "For the establishment of a General Land Office in the Department of the Treasury" (2 Stats., 716), section 10 of which enacted that:

> "No person appointed to an office instituted by this "act, or employed in any such office, shall directly or "indirectly be concerned in the purchase of any right, "title, or interest, in any public land, either in his "own right, or in trust for any other person, or in the "name or right of any other person in trust for "himself, nor shall take or receive any fee or emolu- "ment for negotiating or transacting the business of "the office. And any person offending in the prem- "ises against the prohibitions of this act, shall forfeit "and pay one hundred dollars; and, upon conviction, "shall be removed from office."

The act of July 4, 1836, "to reorganize the General Land Office" (5 Stats., 107), provided in section 14 that:

> "All and every of the officers whose salaries are "hereinbefore provided for, are hereby prohibited "from directly or indirectly purchasing, or in any "way becoming interested in the purchase of any of "the public land; and in case of a violation of this "section by such officer, and on proof thereof being "made to the President of the United States, such "officer so offending shall be forthwith removed from "office."

Both the act of April 25, 1812, and the act of July 4, 1836, *supra*, relate solely to the General Land Office—*i. e.*, the governmental bureau in Washington charged with the administration of the public lands and the officers and employees in that bureau; registers, receivers, surveyors general, or other local officers of the Land Department are not included therein. This distinction is preserved in the codification or re-enactment of these provisions in section 452, Rev. Stats., where the prohibition is in terms limited to persons "*in the General Land Office.*"

In the case of *Grandy vs. Bedell*, 2 Land Dec., 314 (1883), Mr. Secretary Teller, quoting section 452, R. S., says (p. 315):

> "It will be observed that the section quoted, and "this is the only statutory provision bearing on the "subject, does not extend to clerks in the district "offices, but by its terms is confined to those employed "in the General Land Office. Your office has, how-"ever, by rule, extended the operation of this statute "so as to include clerks in the local offices; and this "Department held in the case of The State of Nebraska "*vs.* Dorrington (Copp's L. L. 1882, p. 647), the defend-"ant being at the time of making his timber-culture "entry a clerk in a local land office, that such fact "was sufficient ground for the cancellation of the "entry."

The claimant, Bedell, was a receiver's clerk in the local land office at date of making the timber-culture entry in contest, but at date of initiation of contest by Grandy he had resigned his position. The Secretary therefore held:

> "Taking these facts into consideration and the "further one that *he was not by express provision of law "incompetent to make the entry*, I am of the opinion "that it should be permitted to stand."

The instructions issued by Commissioner McFarland August 28, 1883, and reported in 2 Land Dec., 313, clearly shows that in the opinion of the Land Department there was no statutory inhibition against entries of public land by Land Department employés outside of those in the General Land Office. The instructions referred to are as follows:

> "GENTLEMEN: I am in receipt of the receiver's "letter of July 7, 1883, in which the following ques- "tion is submitted to this office: Is it admissible for "a register or receiver or special agent or clerk to "make a timber-culture entry in a district other than "the one in which he is located?
>
> "I reply that I think such entry, excepting as to "special agents, is admissible. The officer or clerk "making such entry should state in his affidavit the "particular position he holds, that the entry may be "intelligently dealt with."

Subsequently, in 1890, the Land Department appears to have modified the views above expressed, holding in the case of *Herbert McMicken*, 10 Land Decisions, 97, and 11 *ib.*, 96, that a clerk in the office of a United States surveyor general was a clerk or employee in the General Land Office, and hence fell within the inhibition of section 452, Rev. Stats. Under the decision in *McMicken's* case, *supra*, a general circular was issued by the Land Department, dated September 15, 1890, and reported in 11 Land Decisions, 348, stating that:

"In accordance with said decision, all officers, "clerks, and employés in the offices of the surveyors "general, the local land offices, and the General Land "Office, or any persons, wherever located, employed "under the supervision of the Commissioner of the "General Land Office, are, during such employment, "prohibited from entering, or becoming interested, "directly or indirectly, in any of the public lands of "the United States."

The above rule has since been generally adhered to by the Department, although in the case of *Winans vs. Beidler*, 15 Land Dec., 266, decided in 1892, the Land Department appears to have again modified its views as to the construction of section 452, Rev. Stats., holding that Winans, who was employed as a copyist in the General Land Office at Washington, could perfect a homestead entry made shortly before his appointment to such position, saying (p. 268):

"The position he holds cannot be said to give him "any advantage, in finally securing the land, over "the general public; his access to the records of the "office can give him no information valuable to him "pertaining to his entry or his rights to the tract; "there is no opportunity afforded him to practice any "fraud; he has nothing to do with the matter of ad-"judicating the question as to his compliance with "the law when that question shall arise, indeed he "may not hold the place he does, or any other place "in the Land Department, when the time arrives to "make final proof. In view of these facts, I am of "the opinion that section 452, *supra*, does not apply "to this case, for I do not believe that Congress in-"tended, by the enactment of said section, to deprive "any one of valuable property rights, theretofore law-"fully vested in him, simply for the reason that, after "such person had made settlement on public land, "and made an entry, or application to enter such land "under the homestead law, he received an appoint-"ment as a copyist in the General Land Office."

At the date of location of the Yes You Do claim, the locator J. Fewson Smith, Jr., was what is commonly known as a United States deputy mineral surveyor—*i. e.*, a person appointed by a United States surveyor general as qualified to make survey of mining claims, under authority of section 2334, U. S. Rev. Stats. The pertinent provisions of that section are as follows:

> The surveyor general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey.

The designation of "United States deputy mineral surveyor" is one unknown to the Federal statutes. It is a term made use of by the Land Department to designate one appointed under the provisions of section 2334, Rev. Stats., "to survey mining claims." Until the passage of the general mining law of May 10, 1872 (17 Stats., 95), no such position had been created. Under the mining law of July 26, 1866 (14 Stats., 252), and until the passage of the act of May 10, 1872, *supra*, it was the duty of the lode claimant to himself prepare and file a diagram of his claim. To obviate the filing of inaccurate and improperly prepared diagrams the applicant for mineral patent was required by the latter act to file with his application plat and field-notes of his claim "showing accurately the boundaries" (sec. 2325, Rev. Stats.), and the surveyors appointed under section 2334, R. S., *supra*, were designated as persons competent to prepare such plat and field-notes. But in making such plat and field-notes the

mineral surveyor acts not as an employee of the Government, but as the agent and employee of the mineral applicant. The surveyor appointed under section 2333, R. S., has no functions whatsoever outside of the survey of mining claims by the private individuals who employ him. He has no access to the official records of the surveyor general's office other than that afforded any private individual. He does no work for the Government and receives no compensation therefrom. His functions begin and end with the survey of mining claims for those individuals who retain his services. No scale of fees or compensation is fixed either by statute or departmental regulation. Remuneration for his services is entirely a matter of private arrangement with the mineral applicant.

The statute does not require a surveyor appointed under this section to give a bond or take an oath, but the regulations of the Department provide that he shall give bond at the time of his appointment, and that he shall make oath as to the correctness of each survey executed by him. The Government does not furnish him with any work; supply him with instruments; require him to keep open an office for the benefit of the public; pay him any compensation for his services, or reimburse him for his expenses. His time is entirely his own. He may never make a survey after receiving his appointment, or he may make fifty or more a year. If he makes a survey, it is under a private contract with the owner of the claim. Neither the surveyor general, nor the Commissioner of the General Land Office, nor the Secretary of the Interior has any power to compel a surveyor to survey any mining claim. His field-notes have no official character until they have been approved by the surveyor general; but before they receive that character—that is, as soon as they are filed in the office of the surveyor general—the duties of the deputy mineral surveyor cease.

The following are the pertinent regulations of the Land Department relative to deputy mineral surveyors, their ap-

pointment and duties, as set forth in the General Mining Circular, approved December 18, 1903 (31 Land Decisions, 453, 489; 32 *ib.*, 367):

"90. The surveyors-general of the several districts will, in pursuance of law, appoint in each land district as many *competent* surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States deputy surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into such bond for the faithful performance of his duties as may be prescribed by the regulations of the Land Department in force at that time."

"92. The surveyor-general will endeavor to appoint surveyors to survey mining claims, so that one or more may be located in each mining district for the greater convenience of miners."

"93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them."

"The duty of the surveyor ceases when he has executed the survey and returned the field-notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim."

"The surveyors-general and local land officers are expected to report any infringement of this regulation to this office."

"94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with a view of correcting the abuse."

"115. Under section 2334, U. S. Rev. Stats., the U. S. surveyor-general 'may appoint in each land district

containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims.'"

"116. Persons desiring such appointments should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary."

"117. All appointments of deputy mineral surveyors must be submitted to the Commissioner of the General Land Office for approval."

"118. The surveyors-general have authority to suspend or revoke the commissions of deputy mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval."

"119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office."

"120. Neither the surveyor general nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field-work, between deputy mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, *i. e.*, in the local courts. The Department has, however, authority to investigate charges affecting the official actions of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment."

"121. The surveyors-general should appoint as many competent deputy mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms."

"123. In cases where the error in the original survey is due to the carelessness or neglect of the surveyor who made it, he should be required to make the necessary corrections in the field at his own expense, and the surveyor-general should advise him that the penalty for failure to comply with instructions within a specified time will be the suspension or revocation of his commission."

"124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim is the subject of correspondence, give the name and the survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor-general of any change in post-office address."

"125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field-notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field-notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed."

"126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States deputy mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field-notes thereof to the surveyor-general's office without delay."

"127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same."

"128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field-notes and preliminary plat, with his report, to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the

same case by administering oaths to the parties in interest, but as a notary public he may administer the oaths to his assistants in making the survey; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will make no survey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner."

From the foregoing statement of the *status* and functions of United States deputy mineral surveyors, under the Federal statutes and the regulations of the Land Department, it is, we think, manifest that such persons are neither "officers, clerks nor employees in the General Land Office" within the meaning of section 452, Rev. Stats.

(1.) *A deputy mineral surveyor is not an officer.*

In the leading case of *United States vs. Germaine*, 99 U. S., 508, this court, by Mr. Justice Miller, laid down the definition of a Federal officer, saying (p. 509):

> "The Constitution for purposes of appointment very "clearly divides all its officers into two classes. The "primary class requires a nomination by the Presi- "dent and confirmation by the Senate. But foresee- "ing that when offices became numerous, and sudden "removals necessary, this mode might be inconve- "nient, it was provided that in regard to officers in- "ferior to those specially mentioned, Congress might "by law vest their appointment in the President "alone, in the courts of law, or in the heads of depart- "ments. That all persons who can be said to hold "an office under the Government about to be estab- "lished under the Constitution were intended to be "included within one or the other of these modes of "appointment there can be but little doubt."

In that case the defendant Germaine, who was a civil surgeon appointed by the Commissioner of Pensions under sec. 4777, Rev. Stats., was indicted for extortion as an officer of

the United States, but the court held that he was not such officer, saying further (p. 511):

"If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case [*United States vs. Hartwell*, 6 Wall., 385], the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and *permanent*, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

"No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the Commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

"We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor."

Again in *United States vs. Smith*, 124 U. S., 525, this court said (p. 532):

> "An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a Department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States vs. Germaine*, 99 U. S., 508, and in the recent case of the *United States vs. Mouat, ante*, 303. What we have here said is but a repetition of what was there authoritatively declared."

Applying the rule laid down in the above decisions of this court, it is clear that a deputy mineral surveyor is not an "*officer*" within the meaning of section 452, Rev. Stats.

(2.) *Equally apparent is it that a deputy mineral surveyor is not a "clerk," either in the General Land Office or in any public office subordinate to it.*

> "A clerk is one employed in an office, public or private, for keeping records and accounts, whose business it is to write or register, in proper form, the transactions of the persons, tribunal or body for which he is clerk."
>
> *Bouvier Law Dict.*
>
> *People vs. Fire Commissioners*, 73 N. Y., 422.

The duties of a mineral surveyor are exclusively professional and in no sense those of a clerk. He keeps no records or accounts, he registers no act of any superior, he has no custody of public property or papers. His duties consist, when employed by the owner of a mining claim, in making for such owner a survey thereof, showing improvements thereon, with preliminary plat and field-notes of survey. When the field-notes and preliminary plat of survey have

been filed with the surveyor general his duty in the premises is ended, except it be to correct an error made by him. The final plat of survey, with copy thereof and transcript of field-notes, is prepared by the salaried clerks in the surveyor general's office. Thus it will be seen that the first duties performed by any clerk in the surveyor general's office or any branch of the Land Department are performed after the mineral surveyor's work has been completed and he has no part whatever therein.

The term "clerk" has a perfectly definite meaning, which excludes absolutely one employed as a surveyor or in other purely professional capacity.

(3.) *Coming now to a consideration of the still more comprehensive term "employé," we find that it also cannot apply to a deputy mineral surveyor.*

The Century Dictionary thus defines an employé:

> "One who works for an employer; a person working for salary or wages, applied to anyone so working; but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or a domestic servant."

An employé is one who is paid wages as distinguished from salary.

People vs. Meyers, 33 N. Y. R., 18.

It will be observed that the touchstone of the above definition is the "working for salary or wages."

(a.) *The rendition of work or services is an essential element of employment.*

Unless work be done or services rendered in return for compensation there is no employment. Without the performance of work or service any money paid is a mere gratuity, and the receiver thereof is in no sense an employé.

A deputy mineral surveyor renders no service to, or performs no work for, the United States. *He is by law prohibited from doing so if he would.* There has never been an appropriation providing for the payment of a single dollar to deputy mineral surveyors. Paragraph 127 of the Mining Regulations quoted above states:

> "The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same."

Section 5 of the act of August 15, 1876, ch. 287 (19 Stats., 169), provides that—

> "The executive officers of the Government are hereby prohibited from employing any clerk, agent, engineer, draughtsman, messenger, watchman, laborer, *or other employé*, in any of the executive departments in the city of Washington *or elsewhere*, beyond provisions made by law."

The act of May 1, 1884, ch. 37 (23 Stats., 17; 1 Supp. Rev. Stats., 427), provides that—

> "Hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property."

(*b.*) *An employé must receive salary or wages.*

The word, "when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and has but this one meaning when used in the ordinary affairs and business of life."

McCluskey vs. Cromwell, 11 N. Y., 593.

"Salary," as defined in the Century Dictionary, is—

> "The recompense or consideration stipulated to be "paid to a person periodically for services, usually a "fixed sum to be paid by the year, for year or "quarter."

The word "wages" is defined in the Century Dictionary as:

> "That which is paid for a service rendered; what "is paid for labor; hire; now usually in the plural. "In common use the word 'wages' is applied specif- "ically to the payment made for manual labor or "other labor of a menial or mechanical kind."

A mineral surveyor receives from the Government neither salary nor wages as above defined nor any compensation whatever, and is not therefore an employé of the Government. Unless the Government would be liable for his compensation, either originally or upon default of the applicant who engaged his services, he does not sustain that relation to the Government.

In *United States vs. Meigs*, 95 U. S., 748, suit was brought in the Court of Claims by Meigs, a deputy clerk of the supreme court of the District of Columbia, to recover an additional compensation allowed to employés of the Government by joint resolution of February 28, 1867 (14 Stats., 569). This court held that Meigs was not an employé of the Government, since he was appointed by the clerk of the court and was paid by him, Mr. Justice Miller saying (p. 749):

> "The deputy clerk Meigs, whose case is the prin- "cipal one, was appointed by the clerk of the court, "and the latter was appointed by the court. The "deputy served at a salary fixed by contract between "him and the clerk. He was also paid by the clerk, "and worked for the clerk, and performed services "which it was the duty of the clerk to perform, and "for which the clerk received compensation by fees "paid by the litigants for whom those services were

"rendered. It is very difficult to see how this deputy
"clerk can be called an employé of the Government
"at all. The Government was never liable to him
"for any salary at any time, and, if the principal
"clerk had failed to pay him the $2,000, the Govern-
"ment clearly would not have been liable for it."

And it was so ruled with respect to deputy marshals in *Ex parte Simons*, 32 Fed. Rep., 681, and *Powell vs. United States*, 60 Fed. Rep., 687.

In *United States vs. McDonald*, 21 C. C. A., 347; 72 Fed. Rep., 898, McDonald sued the United States for compensation as a clerk in the office of the U. S. attorney for the district of Montana. The court held that he was not an employé of the United States and must look to the district attorney for his compensation, Hawley, D. J., saying:

"The facts of this case present the question whether
"there is such a privity between McDonald and the
"Government as to authorize him to maintain an ac-
"tion against the United States for the services ren-
"dered by him as a clerk in the office of the United
"States attorney for the district of Montana. The
"United States never employed McDonald to perform
"any services, legal or clerical, in their behalf. It is
"true that the Attorney General gave authority to
"the United States attorney for the district of Mon-
"tana to appoint McDonald as a clerk in his office to
"assist him in the discharge of his duties as district
"attorney, at a named salary; but this authority was
"given upon the express condition that McDonald
"'is to understand that he can have no account
"'against the United States for services, but is to look
"'exclusively to the district attorney for his compen-
"'sation.' This authority is conclusive. Its true in-
"terpretation and meaning govern the question."

(c.) The idea of continuity of service is inseparable from the word "employé." An employé is not one who renders an occasional service, in a particular case.

As said by Mr. Justice Brewer in delivering the opinion of the court in *Louisville, &c., R. R. Co. vs. Wilson*, 138 U. S., 501, 505:

> "The terms 'officers' and 'employés' both, alike, "refer to those in regular and continual service. "Within the ordinary acceptation of the terms, one "who is engaged to render service in a particular "transaction is neither an officer nor an employé. They "imply continuity of service, and exclude those em- "ployed for a special and single transaction. An at- "torney of an individual, retained for a single suit, "is not his employé. It is true, he has engaged to "render services; but his engagement is rather that "of a contractor than that of an employé."

The same rule was laid down by this court in *Auffmordt vs. Hedden*, 137 U. S., 310, in which the court, passing upon the *status* of a "merchant appraiser" appointed or selected by the collector of customs under authority of section 2930, Rev. Stats., and whose compensation was payable by the importer, said (p. 326):

> "The merchant appraiser is an expert, selected as "an emergency arises, upon the request of the im- "porter for a re-appraisal. His appointment is not one "to be classified under the civil-service law, he is not "to be appointed on a competitive examination, nor "does he fall within the provisions of the civil-service "law. He is not a 'clerk,' nor an 'agent,' nor a 'per- "son employed,' in the customs department, within "the meaning of section 6 of the civil-service act; "nor is he an officer of the United States, required to "be appointed by the President, or a court of law, or "the head of a Department. He is an expert selected "as such. Section 2930 requires that he shall be a "'discreet and experienced merchant,' 'familiar with "the character and value of the goods in question.' "He is selected for the special case. He has no gen- "eral functions, nor any employment which has any "duration as to time, or which extends over any case "further than as he is selected to act in that particu-

"lar case. He is an executive agent, as an expert as-
"sistant to aid in ascertaining the value of the goods,
"selected for the particular case on the request of the
"importer, and selected for his special knowledge in
"regard to the character and value of the particular
"goods in question. He has no claim or right to be
"designated, or to act except as he may be desig-
"nated."

(*d.*) The use of the word "employé" implies the relation of master and servant.

State vs. Emerson, 72 Maine, 455.

"The relation of master and servant, in its full
"sense, invariably and only arises out of a contract,
"expressed or implied, between the master on the one
"hand and the servant on the other."

Wood on Master and Servant, section 4.

But a mineral surveyor does not pass this test. He has no contract with the Government. He does have a contract with the applicant, and he is therefore an employé of the applicant if of anybody; but he is certainly not an "employé in the General Land Office."

(*e.*) The nature of a mineral surveyor's work precludes him from being designated as an "employé" of the Government, or of any one else.

"Employés are usually considered as embracing
"laborers and servants and those occupying inferior
"positions."

People vs. Meyers, 33 N. Y. S. R., 18.
People vs. Board of Police, 75 N. Y., 41.

In *Macfie vs. Hutchinson* (12 Ont. Pr. Rep., 167), O'Connor, J., in delivering the opinion of the court, said:

"The word employé, or employee as the statute has
"it, is not a legal term, nor is it an English word, but
"a word imported, with its native pronunciation from

"the French language, which is frequently used by "English-speaking people as a convenient common- "place term to designate the relation or situation of a "class of persons who are not precisely menial serv- "ants, but whose whole time and services are em- "ployed and paid for by another person or persons, "or by a corporation, or by the Government. * * * "It seems to me too clear for mistake that the term "employé cannot in its ordinary acceptation be ap- "plied to members of any of the learned professions. "As a fact, I think it is never in common usage ap- "plied by either the learned or the unlearned to a "practicing physician, a lawyer, a clergyman, *a sur- "veyor*, or a civil engineer, practicing his profes- "sional avocation or what pertains thereto."

The surveyor's duties have already been described herein, and it was shown that he is an independent worker, pursuing a calling that demands a high degree of professional education and skill, accomplishing his duties by the use of his own capital and his own expensive instruments and employing at his own outlay his own assistants. He undertakes to produce in his own way, at a time to be chosen by himself and by means determined by himself, a certain result, viz., a survey. He is, therefore, not an employé, but a contractor.

"Since, to constitute the relation of master and serv- "ant, the volitions of the latter must be presump- "tively or in fact controlled by the former, a con- "tractor who simply undertakes to bring about a re- "sult after his own methods, is not a servant."
Bishop on Non-Contract Law, sec. 602.
Campfield vs. Lang, 25 Fed. Rep., 128.

If a mineral surveyor be held to be an employé of the Government, then his own assistants employed by him upon the survey are also employés of the Government and subject to the prohibition of section 452. The absurd result would follow that nobody could hold a rod or carry a chain in a

mineral survey without forfeiting his right to enter public lands.

A partial reservation of authority or control in certain respects does not transform the contractor into a mere servant.

Wood on Master and Servant, 618.
Cooley on Torts, 548.
Wharton on Agency, secs. 19, 20.

Thus, the requirements that the survey be made in conformity to the general rules of the General Land Office and the instructions of the surveyor general; that lumber be sawed according to directions given; that a railroad contractor do his work under the supervision and to the satisfaction of the chief engineer, or a builder under the supervision of the architect, or a plumber under the supervision of an official known as the inspector of plumbing—none of them make a contractor a mere employé of anybody.

Where a contractor to grade a street "agreed to conform "the work to such further directions as should be given by "the street commissioner and one of the city surveyors" (which is as full power and authority as is exerted over a deputy mineral surveyor by the surveyor general or any other officer of the Land Department), the court held:

> "This clause in the contract does not in any man-
> "ner affect the case. It does not constitute Foster
> "(the contractor) any more the immediate agent or
> "servant of the defendant than if the provision were
> "not inserted in his contract."
>
> *Pack vs. Mayor, etc., of New York*, 8 N. Y., 222.
> *Kelly vs. Mayor, etc., of New York*, 11 N. Y., 432.

In *Kearney vs. Oakes et al.*, 18 Canada Sup. Ct., 148, a contractor with the Dominion Government for the construction of a government railway, being sued for acts performed by him in the execution of said government work, pleaded that he was an "employé" of the government and entitled to certain notice as such employé. His services seem to have

been analogous to those of a deputy mineral surveyor, viz. to do government work on government land, though, unlike the surveyor, he was paid by the government. But the court held that "employé" means "servant" and nothing more.

> "When a man is employed in doing a job or a "piece of work with his own means, and his own "men, and employs others to help him or to execute "the work for him and under his control, he is the "superior who is responsible for their conduct, no "matter whom he is doing the work for."
> *Blake vs. Ferris*, 5 N. Y., 58.

The Pennsylvania statute of 1802 provided "that every "person who shall hold any office, or appointment of profit "or trust, under the Government of the United States, "whether a commissioned officer or otherwise, a subordi-"nate officer or agent, who is or shall be employed under "the legislative, executive or judicial departments of the "United States * * * is hereby declared to be incapa-"ble of holding or exercising, at the same time, the office or "appointment of * * * alderman of any city * * * "under this Commonwealth."

One Binns having been elected alderman, the question as to his right to hold said office was raised by *quo warranto*, the fact being that he had received an "appointment" by the Secretary of State of the United States to publish the laws of the United States. His compensation was also received direct from the United States. But the supreme court of Pennsylvania held in *Commonwealth vs. Binns*, 17 Serg. & Rawle, 220:

> "That the case does not come within the words of the "act of assembly, nor within the meaning of it; that "John Binns holds merely a contract under the Fed-"eral Government, an extensive job of work, as "printer of a newspaper, implying such trust only as "is ordinarily implied in contracts for work; and that

"it is neither an office, nor appointment or employ-
"ment in the nature of an office, incompatible with
"the office of alderman, under the act of assembly of
"1802."

Where a New Jersey statute gave a lien upon the assets of corporations to their employés, the court, in *Lehigh Coal & Nav. Co. vs. C. R. R. Co. of N. J.*, 29 N. J. Eq., 255, held:

"He who furnishes the labor or service of others,
"under a contract to do the whole business of a cor-
"poration, or a particular branch of it, is neither
"within its words nor its spirit."

And construing a similar statute of Indiana, in *Vane vs. Newcomb*, 132 U. S., 220, 233, in language absolutely controlling in the present case, this court said:

"It seems clear to us that Vane was a contractor
"with the company, and not an employé within the
"meaning of the statute. We think the distinction
"pointed out by the circuit court is a sound one,
"namely, that to be an employé within the meaning
"of the statute Vane 'must have been a servant,
"'bound in some degree at least to the duties of a
"'servant, and not,' as he was, 'a mere contractor,
"'bound only to produce or cause to be produced a
"'certain result,—a result of labor to be sure,—but
"'free to dispose of his own time and personal efforts
"'according to his pleasure, without responsibility to
"'the other party.'"

And even where a man, employed in printing the paper money of the United States, worked in a Government building, on material furnished by the Government, and was paid by the Government, he was held, because he employed an assistant, to be not an employé, but a contractor.

Twenty Per Cent. Cases, 20 Wall., 179.

(4.) *The departmental ruling.*

As has been shown, the decisions of the Land Department upon the general scope of section 452, Rev. Stat., have been entirely contradictory, the Department holding, until the decision in the McMicken case, *supra*, in 1890, that the statutory prohibition only extended to persons employed in the General Land Office itself—*i. e.*, the governmental bureau in Washington—not to officers or employees in local offices of the Land Department. In McMicken's case the Department held that a salaried clerk in the office of the surveyor general of Washington Territory was prohibited by the statute from purchasing public lands. It was not, however, until February, 1898, *after the date of the location of the claim here in question*, that the Department held, in *Floyd vs. Montgomery*, 26 L. D., 122, that a deputy mineral surveyor was prohibited by statute from making entry of a mining claim.

The first reported case in which the Land Department passed upon the right of a deputy mineral surveyor to make entry of lands is *Denison vs. Willits*, 11 Copp's L. O., 261 (1884), in which Commissioner McFarland said:

> "There seems to be no valid objection as to the "right of a deputy surveyor to make a mineral entry, "in which case he cannot act in any other capacity "than that of claimant."

The next case in which the question arose was that of Lock Lode, 6 L. D., 105, wherein the Secretary said:

> "But one question is in this case, viz: The right of "a deputy mineral surveyor to make a mineral entry "in the district for which he is appointed."

He then quotes section 2319, Revised Statutes, declaring all mineral deposits on public lands to be open to exploration and purchase, and adds:

> "Section 2325 of the U. S. Revised Statutes pro- "vides that any one authorized to *locate* a mineral

"claim may procure a patent for the same upon com-
"pliance with certain requirements and conditions
"therein specified.

"Deputy surveyors are appointed by the surveyor
"general of each surveying district, under and by
"virtue of the authority conferred in section 2334 of
"the U. S. Revised Statutes. Under this section the
"surveyor generals of the several districts appoint as
"many competent deputy surveyors for mining claims
"as may apply to them for such appointment, and
"give bond in the sum of $10,000 for the faithful per-
"formance of their duties. A mineral claimant then
"has the option of employing any one of said depu-
"ties to do his surveying with whom he can make a
"suitable contract, it being always understood that
"the claimant is to bear all the expenses of notices,
"surveys, &c.

"It was ruled by your office, February 6, 1884, in
"the case of Denison and Willits (11 C. L. O., 261)—
"the only time the question has ever been raised, so
"far as can now be ascertained—that a deputy min-
"eral surveyor may make mineral land entries in his
"own district, but in that event he cannot act in any
"other capacity than that of claimant.

* * * * * * *

"It would seem that there can be no valid objection
"to this entry as a matter of public policy, unless it
"be said that claimant's position as a deputy surveyor
"gives him an advantage over the rest of the com-
"munity in locating claims—in other words, his posi-
"tion gives him special information as regards the
"places where valuable minerals are to be found. I
"am not of opinion, however, that this objection
"should be sufficient to work a forfeiture of an entry
"already made, or to prevent the making of one."

This ruling of the Land Department remained in full force without any modification until the decision in *Floyd vs. Montgomery, supra.* In that case a deputy mineral surveyor was one of seven coapplicants for patents on a mining claim. His interest in the claim was acquired after location and

immediately prior to application for patent. He made the survey and prepared and filed preliminary report and field-notes with report on improvements. It being urged that he was disqualified by section 452, Revised Statutes, from obtaining patent, the Secretary directed that the deputy mineral surveyor's name be stricken from the final certificate, and the entry passed to patent in the name of the remaining coapplicants, saying (p. 136):

> "In Herbert McMicken *et al.* (10 L. D., 97, on review 11 L. D., 96) Secretary Noble held that an officer, clerk or employee in the office of a United States surveyor general is an officer, clerk or employee in the General Land Office within the meaning of this section; in Muller *v.* Coleman (18 L. D., 394) Secretary Smith held that a deputy surveyor is such an employee, and in the Neill case (24 L. D., 393), the present Secretary held that a surveyor general is within the inhibition so declared. A circular of similar import was issued September 15, 1890 (11 L. D., 348). From an examination of these authorities and a consideration of the language and manifest purpose of the section, it seems clear that its prohibitive provisions embrace a deputy mineral surveyor. In so far as the cases of State of Nebraska *v.* Dorrington (2 C. L. L., 647; Dennison and Willits (11 C. L. O., 261), and Lock Lode (6 L. D., 105), are in conflict with the views expressed in these later cases they are overruled."

In *Frank A. Maxwell*, 29 L. D., 76, and *Alfred Baltzell, ib.*, 333, the Department again ruled that a deputy mineral surveyor was disqualified by the statute from making entry, basing said decision solely on *Floyd vs. Montgomery, supra.*

The next and last ruling of the Department on this question was in the case of *W. H. Leffingwell* (30 L. D., 139), 1900, holding (*syllabus*) that—

> "A deputy mineral surveyor who has no interest, real or contingent, in a mining claim at the date of the survey thereof by him, nor at the date of the

"application for patent thereto, but who subsequently "makes entry thereof, does not come within the spirit "of section 452 of the Revised Statutes, prohibiting "employees of the General Land Office from 'pur- "chasing or becoming interested in the purchase of "the public land.'"

The Secretary saying:

"Without at the present time considering the cor- "rectness of the conclusion arrived at in the case of "*Floyd et al. vs. Montgomery et al.* (26 L. D., 122, 136), "and similar cases, in so far as it was therein held "that the prohibitive provisions of said section em- "brace a deputy mineral surveyor, it is sufficient to "say that the facts in this case, as disclosed by the "record, are materially different from those stated in "the cases referred to.

"Independently of the statute it would be within "the power of the Land Department in making regu- "lations for the survey of mining claims to provide "against the survey thereof by one interested in the "claim, the reason therefor being manifest. In the "case under consideration Leffingwell had no inter- "est, real or contingent, in the claims involved at the "date of the survey thereof by him, or at the date of "the application for patent thereto, and under these "circumstances it is not believed that he is within the "spirit of the statute or circular above quoted."

It thus appears that until 1898 and after the location of the claim here in question no doubt was expressed by the Land Department as to the right of a deputy mineral surveyor to make a mineral entry, the Department in two decisions expressly ruling that he had such right. In *Floyd vs. Montgomery, supra*, the Department reversed its previous decisions and held that a mineral surveyor was prohibited by the statute from making entry. In 1900 this latter ruling was again reversed, in effect if not in express terms, the Department holding that where the mineral surveyor had no interest in the claim at date of survey and

application he could subsequently make entry thereof. *And this stands the rule of the Land Department today as it was at date of both decisions in this case.*

Manifestly, if a deputy mineral surveyor can, as owner of a claim, make entry thereof by purchase from the Government, he is not within the class of persons prohibited by section 452, Rev. Stats., from purchasing public lands, and a requirement by the Department that he shall not make the survey of the claim he seeks to purchase is a mere administrative regulation without basis in statutory requirement.

A review, then, of *all* cases shows that the only authority in support of the ruling of the court below is the decision of the Land Department in *Floyd vs. Montgomery, supra*, a decision made after the date of the Yes You Do location and which has since been reversed. The ruling of the Land Department stands now as, with the exception of a brief period, it has always stood since the passage of the mining law of 1872, that a deputy mineral surveyor is not, *as such*, prohibited from purchasing public lands.

(5.) *The purpose of the statute.*

We have shown that, by any fair interpretation of its terms, the statute does not include United States deputy mineral surveyors within its inhibition. It is equally clear that it was not within the contemplation or purpose of the Congress to forbid the acquisition of the public lands by such persons. The construction of the court below is alike violative of the spirit and the letter of the statute.

The object of the statute is thus stated by Secretary Noble in *Herbert McMicken's* case, 10 Land Dec., 97, 99:

> "The object of sec. 452 was evidently to remove
> "from the persons designated the temptation and the
> "power by virtue of the opportunities afforded them
> "by their employment to perpetrate frauds and ob-
> "tain an undue advantage in securing public lands
> "over the general public by means of their earlier

"and readier access to the records relating to the dis-
"posal of, and containing valuable information as to,
"such lands."

A deputy mineral surveyor has no access to the records of the surveyor general's office, the local land office, the General Land Office, or the office of the Secretary of the Interior, other or greater than those enjoyed by private citizens generally. In his practice as a mineral surveyor he comes in contact with the Land Department only in the specific case or cases in which his services have been engaged by intending mineral claimants. In such connection he may have access to the official plats of survey and other non-confidential records which have a bearing on the case in which he has been employed, precisely as may his principal. To such records any interested individual may have as ready access. An attorney practicing before the Land Department is given equal opportunity to examine all non-confidential records of the Department, or any of its bureaus, having a bearing upon his client's case, and in so far as proper is facilitated in his examination by the officials and employés in charge. Yet it cannot be contended that an attorney, because practicing before the Land Department, is therefore precluded from exercising the rights and privileges conferred on all citizens with respect to the acquisition of the public lands. It is possible, of course, that an attorney may abuse the privilege thus allowed him by the Department, and, if so, the remedy or the penalty is plain, and is expressly provided for in the departmental regulations and rules of practice, viz., disbarment. And so if a deputy mineral surveyor in anywise misconducts himself in practicing before the Department his license or appointment may, on cause shown, and as expressly provided in the regulations above quoted, be suspended or revoked. In no way, however, can the deputy mineral surveyor obtain any information from which the general public is excluded. His position as respects the

records, correspondence, and other papers in the several branches of the Land Department is strictly that of an outsider, and the position which he holds gives no advantage over other citizens in the purchase or acquisition of the public lands. It is obvious, therefore, that there is no reason why he should be prohibited from purchasing such lands, and that the Congress never contemplated any such result.

(6.) *The true status of the deputy mineral surveyor.*

Analysis of the statute (sec. 2334, R. S.), and of the departmental regulations relative to deputy mineral surveyors, and of the functions of such persons in relation to the Land Department and to those employing them, shows that their *status* as regards the Government of the United States and the Land Department is that of *mere licensees.*

The Government furnishes him no work at any time. It cannot command him to do any work. It cannot accept any work or service from him (act May 1, 1884, ch. 37; 1 Supp. Rev. Stats., 427). He is simply authorized to act in behalf of applicants for mineral patents in certain of the necessary preliminary proceedings before the Land Department.

The position of a mineral surveyor is entirely similar to that of an attorney practicing before the Department. Each may be said in a vague and general way to be an "officer" of the Department, but not such an officer as the statute contemplates. The function of each is the same, viz., to assist an applicant in his proceedings to obtain title to his land from the United States. Each, before he is permitted to act, is required to pass a test of his competency to render such assistance. Each is required by the regulations of the Department, though not by statute, to take an official oath. Each then receives an official paper authorizing him so to render service to applicants for patent. Each thereupon makes with the applicant a contract, express or implied, for

his compensation—a contract with which the Government has nothing to do.

In pursuing his duties each prepares, under his private contract, certain papers which remain his private papers and have no official character until formally placed on file in a Government office. Each is liable to be called to account by the Department for misconduct in his so-called "office," and upon being found guilty each is liable to the only punishment which the Department can inflict, viz., the withdrawal of the privilege of assisting claimants to obtain their title. In the prosecution of his work each is entitled to consult such books, papers, and records of the Land Department in its several branches as may bear upon the particular case upon which he is engaged, and no other books, papers, or records.

If a mineral surveyor is within the prohibition of section 452, an attorney must be held to be equally so, and indeed he is more nearly an officer of the United States, since he received his appointment to practice from the head of a Department, and not from a subordinate official. Yet it will hardly be asserted that an attorney is within the prohibition.

II.

EVEN IF THE PROHIBITION OF SECTION 452 OF THE REVISED STATUTES IS APPLICABLE TO DEPUTY MINERAL SURVEYORS, TITLE TO THE YES YOU DO CLAIM IS NEVERTHELESS GOOD IN THE PRESENT HOLDER, THE PLAINTIFF IN ERROR.

The proof offered (Rec., 46, 136) shows that by deed dated the 5th day of September and recorded October 17, 1898, in the land records of Salt Lake county, Utah, J. Fewson Smith, the locator of the Yes You Do claim, before the initiation of this proceeding and the filing of the adverse claim, conveyed all his right, title, and interest therein to the plaintiff

in error, Lavagnino. Mr. Lavagnino is a citizen of the United States (Rec., 45, 46), and there is no contention that he is in any way disqualified from acquiring title under the mining laws.

Conceding, merely for the argument, that section 452, Rev. Stats., has any application to United States deputy mineral surveyors, the title to the Yes You Do claim, initiated by the location of Deputy Mineral Surveyor Smith, is good in the hands of a person qualified to take and hold under the mining laws. The decisions of this court would seem conclusive as to this.

In *Manuel vs. Wulff*, 152 U. S., 505, this court, reversing the supreme court of Montana, held that an alien could take and hold the possessory title under a mining location, subject to question in regard to his citizenship by the Government only.

And in the later case of *McKinley Creek Mining Co. vs. Alaska United Mining Co.*, 183 U. S., 563, the court held that the locator of a mining claim acquires his possessory title therein by purchase. In that case the court, by Mr. Justice McKenna, said (p. 571):

> " In *Manuel v. Wulff*, 152, this court sustained the " validity of a conveyance of a mining location to an " alien, reversing a decision of the supreme court of " Montana to the contrary. The decision was based " upon the difference between a title by purchase and " title by descent, and the doctrine expressed that an " alien can take title by purchase and can only be " divested of it by office found.
>
> * * * * * * *
>
> " That grantees of the public land take by purchase " this court, in *Manuel v. Wulff*, left no doubt. It was " said that when a location is perfected it has the effect " of a grant by the United States of the right of present " and exclusive possession. *Forbes v. Grady*, 94 U. S., " 762; *Belk v. Meager*, 104 U. S., 279; *Gwillim v.*

" *Donnellan*, 115 U. S., 45; *Noyes v. Mantel*, 127 U.S.,
" 348.

* * * * * * *

" *The meaning of Manuel v. Wulff, is that a location by*
" *an alien, and all the rights following from such location*
" *are voidable, not void, and are free from attack by any*
" *one except the Government.*"

The legal effect of the disqualification of alienage and of that resulting from section 452, Rev. Stats., would appear entirely similar. An alien is disqualified from acquiring title under the mining laws by *exclusion* from the grant of section 2319, Rev. Stats., which is limited to " citizens of the United States and those who have declared their intention to become such." The persons described in section 452, Rev. Stats., are disqualified by reason of their *inclusion* in the prohibition of the statute. The disqualification is no greater, no less, in the one case than in the other. Since, then, " a location by an alien and all the " rights following from such location are voidable, not void, " and are free from attack by any one except the Govern-" ment," it certainly seems that a similar rule should be applied to a location by one who is under the disability created by section 452, Rev. Stats.

It is the long-settled rule that an alien, though disqualified from holding real property, may nevertheless by deed convey a perfect title thereto, and that the purchaser's title cannot be attacked on the ground of the disability of his grantor.

Until office found, an alien " may sell and convey or devise the lands, and pass a good title to the same " (*Washb. Real Property*, vol. 1, p. 63).

" He cannot be divested of his estate in the land by
" the State, until after a formal proceeding on infor-
" mation filed for that purpose; and until this is done
" he may take, hold, sell, and convey—and some courts
" even go so far as to hold that he may devise—the

> " land he has possession of and pass a good title
> " thereto.' *Kerr on Real Property*, vol. 1, p. 215.

So, also, in the case of a corporation which by its charter or by statute is prohibited from acquiring or holding a certain quantity or value thereof, the courts have always held that such corporation could vest in its grantee a perfect title to the land which it was prohibited from holding.

In *National Bank vs. Matthews*, 98 U. S., 621, this court said (p. 628):

> " Where a corporation is incompetent by its charter
> " to take a title to real estate, a conveyance to it is
> " not void, but only voidable, and the sovereign alone
> " can object. It is valid until assailed in a direct
> " proceeding instituted for that purpose. *Leazure v.*
> " *Hillegas*, 7 Serg. & R. (Pa.), 313; *Goundie v. North-*
> " *ampton Water Co.*, 7 Pa. St., 233; *Runyon v. Coster*,
> " 14 Pet.. 122; *The Banks v. Poitiaux*, 3 Rand (Va.),
> " 136; *McIndoe v. The City of St. Louis*, 10 Mo., 577.
> " See also *Gold Mining Company v. National Bank*, 96
> " U. S., 640."

And in *Jones vs. Habersham*, 107 U. S., 174, Mr. Justice Gray, speaking for the court, said (p. 188):

> " Restrictions imposed by the charter of a corpora-
> " tion upon the amount of property that it may hold
> " cannot be taken advantage of collaterally by pri-
> " vate persons, but only in a direct proceeding by the
> " State which created it. *Runyan v. Coster*, 14 Pet.,
> " 122. 131; *Smith v. Sheeley*, 12 Wall., 358, 361; *Bo-*
> " *gardus v. Trinity Church*, 4 Sandf. (N. Y.) Ch., 633,
> " 758; *De Camp v. Dobbins*, 29 N. J. Eq., 36; *Davis v.*
> " *Old Colony Railroad Company*, 131 Mass., 258, 273.'

And again in *Reynolds vs. Crawfordsville Bank*, 112 U. S., 405, 413, the court said:

> " Where a corporation is incompetent by its charter
> " to take a title to real estate, a conveyance to it is not

> "void, but only voidable; the sovereign alone can "object. It is valid until assailed in a direct pro- "ceeding instituted for that purpose."

Applying this established rule to the case at bar, it follows that even if the locator of the Yes You Do claim comes within the inhibition of section 453, Rev. Stats., which we earnestly deny, his conveyance to the plaintiff in error vested in him a perfect title and one not open to attack from any source.

From the testimony of Smith (Rec., 71) it appears that at the time he conveyed the Yes You Do claim to Lavagnino there was an agreement between them that if and when Lavagnino obtained patent to the claim he was to pay Smith a further sum of $600, less any amount expended in securing patent or in litigation incident thereto. After alluding to this evidence the supreme court of Utah, in its opinion, adds (Rec., 144):

> "Before making the adverse claim and bringing "this suit Lavagnino knew that Smith was a deputy "U. S. mineral surveyor, for Smith, as such, made "the survey and plat filed in the land office with the "adverse claim, so that, if section 452 includes deputy "mineral surveyors, Lavagnino, before expending any "sum except one dollar, was at that time advised of "the fact, if he was not before, that his agreement "with Smith was in violation of the provisions of said "section, and that the conveyance of the 'Yes You "Do' for that reason was invalid."

In so holding, we submit, the court below plainly erred. The fact that Smith, in the event that Lavagnino obtained patent to the Yes You Do claim, might receive some additional compensation for his conveyance, in nowise alters the legal effect of the deed. The deed conveyed all Smith's title in the claim to Lavagnino. No title, legal or equitable, remained in Smith after the conveyance. If, under the agreement referred to, any further sum should become due on

the purchase price, Smith would have no lien on the lode claim therefor. Such further sum could only be recovered in *assumpsit* against Lavagnino, inasmuch as the laws of Utah do not provide for a vendor's lien.

The fact that Lavagnino knew that Smith was a deputy mineral surveyor can have no possible bearing on the validity of the conveyance. As we have shown above, even if Smith came within the prohibition of section 452, Rev. Stats., he could nevertheless convey a perfect title to a qualified grantee. The fact that Smith might receive some possible further sum on account of his conveyance of the claim could not possibly, under section 452, Rev. Stats., affect Lavagnino's title under the deed, which was without condition and created no trust interest in Smith's favor.

The only possible effect of the statute, if it applies, would be to render Smith liable to removal from his position as deputy mineral surveyor. Hence in excluding the deed from Smith to Lavagnino there was manifest error.

III.

EVERY RULING BELOW NOW CLAIMED AS ERROR WAS DISTINCTLY BASED ON THE COURT'S CONSTRUCTION OF SECTION 452, REV. STATS., AS DENYING OR PROHIBITING THE RIGHTS CLAIMED BY PLAINTIFF UNDER SECTION 2319, REV. STATS., AND OTHER PROVISIONS OF THE MINING LAWS.

In rejecting the offered proof of the location of the Yes You Do claim and of the conveyance thereof from Smith to Lavagnino the trial court in express terms based its ruling on section 452, Rev. Stats., which it was held limited the grant of section 2319 to the exclusion of the rights claimed by plaintiff thereunder, the court saying (Rec., 74):

> "The court in the construction of these two sections
> "holds that section 452 qualifies the section 2319, to
> "the extent that—as construed by the court—it would

"be prohibited as a matter of public policy, that is, "the right of J. Fewson Smith to make this loca- "tion."

In rejecting the offered proof of the filing of protest and adverse claim in the United States Land Office, the trial court said (Rec., 76):

"As to the proceedings in the Land Office, in so "far as the claim of the plaintiff to the Yes You Do "is concerned, the court having held that the loca- "tion was void, having held that the locator, J. Few- "son Smith, was not authorized, but prohibited by "the law from making the location, and that the filing "of the adverse claim by him in the Land Office "would be invalid, the objection to that offer will be "sustained."

In rejecting the offered proof of the Levi P. location and claim, the trial court said (Rec., 130):

"No adverse claim has been filed, though through "the peculiar conditions which have arisen in the "trial of this case, the plaintiff, who claims to be the "owner of the Yes You Do claim, also claims that he "did file an adverse claim to this application for "patent, but on account of the invalidity of the loca- "tion notice of the Yes You Do and the reason that "the locator of the claim was disqualified, being a "deputy United States mineral surveyor, and couldn't "initiate any title by anything he might do with ref- "erence to making a location of the Yes You Do, the "location notice has been rejected as evidence. Now, "that being so, the application for a patent being un- "challenged, the assumption of the law is that the "applicants are entitled to patent their claims as ap- "plied for, and third parties will not be permitted to "question the validity of the proceedings to obtain "patent, or make any objections, except to show that "the applicants for a patent have not complied with "the law. The Eureka case, decided in 4th Saw- "yer—I don't remember the name of it—held that "when a party made an application for a patent, any

"adverse claimant failing to file his adverse claim
"within the sixty days' period of publication, in which
"he asserted or, rather, defined the nature and bound-
"aries and extent of his adverse claim, that he
"would be held to waive it. And as no adverse
"claimants are before the court to any part or any
"portion of the land embraced within the Uhlig
"No. 1 and the Uhlig No. 2 claims as surveyed and
"applied for, I don't think the location notice of any
"adjoining or conflicting claim could be heard to
"determine the right of the applicants to a patent in
"this case. And looking at the law in this way, I
"will rule out the location notice of the Levi P."

In rejecting the offered proof of the location of the Veta Lode claim, the trial court said (Rec., 134):

"In the position which the court has taken in the
"admission and rejection of testimony and the con-
"struction of the law, the facts might be as you con-
"tend, but still having failed to put in your adverse
"claim within the prescribed period, and defining
"the extent and boundaries of your claim, so far as
"these two locations are concerned, the Veta and the
"Levi P., whatever right the parties may have was
"waived by failure to properly adverse the applica-
"tion for patent by the defendant."

It is clear, therefore, (1) that the trial court excluded the evidence of the location of the Yes You Do claim, and of plaintiff's ownership thereof, because it held that the claimed location and possession thereof was in violation of section 452, U. S. Rev. Stats.; (2) that the proof of filing adverse was excluded because the location asserted as basis therefor was held to be void under section 452, U. S. Rev. Stats., and hence, under the ruling of the court, no valid adverse claim could be based thereon, and (3) that the offered proof of the Levi P. and Veta locations was excluded, because, no valid adverse claim under the court's previous ruling having been filed, the presumption under section 2325,

U. S. Rev. Stats., was conclusive that the defendants were entitled to possession. The necessary consequence of these rulings and this construction of the statute was a finding by the trial court that the defendants had been in exclusive possession of the area in conflict with the Uhlig No. 1 and 2 locations since 1889, and judgment was accordingly entered confirming their possessory title (Rec., 37, 40).

Examination of the opinion of the State supreme court shows that its decision was also predicated entirely upon its erroneous construction of section 452, U. S. Rev. Stats. The learned chief justice after quoting section 452, R. S., says (Rec., 144):

> "We think that the section in question includes "mineral surveyors and prohibits them, as held by the "Land Department, from entering any of the public "lands, while they are such deputies, and also from "directly or indirectly, acquiring any interest in the "purchase from the Government of the same. It fol- "lows that as J. Fewson Smith, Jr., while he was a "deputy mineral surveyor, was prohibited by said "section from entering a mining claim or directly or "indirectly acquiring any right or interest in the "purchase from the Government of such a claim, he "was also prohibited at that time from doing any of "the acts, upon the performance of which, under the "provisions of the mining law of 1872, the right of "making an entry, or purchase from the Govern- "ment, depends, and that his location of the 'Yes "You Do' was therefore void, and Lavagnino ac- "quired no rights under the deed to him of the same.
>
> "*The failure of the plaintiff to show, in chief, any "right to the premises in controversy disclosed the fact "that he was 'a stranger to the title' of the premises in "dispute, and that a nonsuit could, on motion, have "been properly granted.* So that a failure to establish "the defendant's claim could in no way benefit him "or validate his alleged title to the 'Yes You Do.' "Therefore the plaintiff had no more interest in, or "right to further contest the defendant's claim, on "the ground that the 'Levi P.' and 'Veta' were

> " valid and subsisting claims, than the said Andrew
> " P. Mayberry himself, or any other stranger had."

The court then quotes section 2325, U. S. Rev. Stats., to the effect that if no adverse claim be filed within the period of publication, " it shall be assumed that the applicant shall be entitled to a patent," and cites numerous cases to the same effect, adding (Rec., 147):

> " We think it is clear, both from the language of
> " the sections of the Revised Statutes referred to and
> " the authorities cited that it must, as stated by Mr.
> " Justice Brewer, be conclusively presumed that An-
> " drew P. Mayberry, as he failed to make any adverse
> " claim, had none, *and as the plaintiff failed to show any*
> " *right to the disputed premises, he became a stranger to*
> " *the title, and thereafter had no more right than any*
> " *other stranger to further contest the defendant's claim.*"

Then quoting from the finding of the trial court that the defendants have been in possession of the premises in controversy since January 1, 1889, the court cites and applies the State statute of limitations, concluding (Rec., 149):

> " The plaintiff, even if J. Fewson Smith, Jr., had
> " not been a deputy U. S. mineral surveyor, as the
> " location of the ' Yes You Do ' was not made until
> " eight years after the said possession of the Uhlig
> " Nos. 1 and 2 was begun, could not avail himself of
> " any rights which the said Mayberry may have had."

The court's reasoning follows the same lines as that of the court below. From the erroneous premise that the Yes You Do location was in violation of section 452, Rev. Stats., the court deduces the following propositions: (1) That plaintiff's protest and adverse claim based on the Yes You Do location was invalid and goes for naught; (2) that plaintiff, having filed no valid adverse, had no standing in court as adverse claimant—" was a stranger to the title;" (3) that plaintiff, not having the *status* of an adverse claimant under sec-

tion 2326, Rev. Stats., had no right to set up the prior Levi P. and Veta locations in rebuttal of defendants' claim that the ground was unappropriated at date of the Uhlig locations; (4) that no valid adverse claim having been asserted during the period of publication on the Uhlig Nos. 1 and 2, the presumption, under section 2325, U. S. Rev. Stats., was conclusive that defendants were entitled to the possession; and, further, (5) there being before the court no proof of any possession of the premises adverse to defendants, and there being a *prima facie* showing of their possession and working for a period exceeding the State statute of limitations, the presumption of defendants' title was also conclusive under section 2332, U. S. Rev. Stats.

Assuming the correctness of the premises, the propositions deduced therefrom are unassailable, but if section 452, U. S. Rev. Stats., does not prohibit location by a deputy mineral surveyor the whole structure falls, and every conclusion reached by the court is erroneous.

With due deference to the learned court, the statement that "the plaintiff, even if J. Fewson Smith, Jr., had not "been a deputy U. S. mineral surveyor as the location of the "'Yes You Do' was not made until eight years after the said "possession of the Uhlig Nos. 1 and 2 was begun, could not "avail himself of any rights which Mayberry may have had," is manifestly incorrect.

It is fundamental that, in order to acquire prescriptive title by adverse possession, such possession must be exclusive.

> "Adverse possession may best be defined as an actual, visible, and *exclusive* appropriation of land, commenced and continued under a claim of right—either openly avowed or constructive, as arising from the acts and circumstances attending the appropriation—to hold the land against him who was seized."
>
> *Buswell on Limitations and Adverse Possession*, sec. 237, p. 324.

> "It must be, in the language of the authorities, an actual, continued, adverse and *exclusive* possession for the space of time required by the statute."
> *Doswell vs. De la Lanza*, 20 How., 29, 32.

> "It is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted, as well as open, notorious, actual, *exclusive*, and adverse."
> *Armstrong vs. Morrill*, 14 Wall., 120, 145.

In *Ward vs. Cochran*, 150 U. S., 597, 609, this court reversed the court below for error in instructing the jury, because—

> "The jury were not told that, to make out the defense, the possession, in addition to certain other features properly specified, must be shown to have been actual and *exclusive*."

In *Larwell vs. Stevens*, 12 Fed. Rep., 559, the court, in charging the jury, said (p. 560):

> "As already stated, the possession, in order to avail the defendant, must be an exclusive possession; that is, he must not have held it within 10 years prior to the commencement of the suit in conjunction with one who was the real owner of it. If the real owner and the claimant of the possession, within 10 years prior to the bringing of the suit, had joint possession of the premises sued for, such a possession will not avail this defendant. The possession follows the title, and, if the owner and others are in possession, the law considers the owner to have the possession."

And in *Bracken vs. Union Pacific Railway Co.*, 5 C. C. A., 548; 56 Fed. Rep., 447, the court said (p. 450):

> "It is assigned for error that the court permitted the plaintiff to show that there was a traveled road across the land, and that there was nothing to prevent stock from straying upon it, and that persons other than the defendant cut hay upon the land. We see

no objection to this testimony. The question at issue was the duration, nature, and quality of the defendant's possession of the land. The character of the possession could only be determined by showing the condition of the land and the use made of it. The defendant claimed and exercised this right, and he could not object to the plaintiff's introducing in rebuttal any evidence having a tendency to show that his possession was not actual and exclusive. Any evidence tending to throw light on the nature, extent and character of the defendant's possession was relevant."

And the same rule has been repeatedly laid down by the supreme court of Utah.

In *Larsen vs. Onesite*, 20 Utah, 432; 59 Pac. Rep., 234, 235, the court said:

> "Where a party relies upon his title as obtained by prescription, he must allege the facts showing the existence of the right, or plead the prescriptive right, averring that the existence of the right was under a claim of right, was peaceable, without interruption, and open, notorious and *exclusive*."

And in *Coleman vs. Hines*, 24 Utah, 360; 67 Pac. Rep., 1122, an action in ejectment by a plaintiff claiming title by adverse possession, the court held that plaintiff had failed to establish her prescriptive title, since "the possession was not continuous, adverse, uninterrupted, or *exclusive*, for a period of seven years." The court then quotes with approval the passage from *Larsen vs. Onesite, supra*.

And again in *Dignan vs. Nelson*, 26 Utah, 186; 72 Pac. Rep., 936, 937, the court said:

> "In order to constitute an effective adverse possession, *there must be an ouster of the real owner*, followed by an actual, notorious and continuous possession of the adverse claimant."

It is manifest, therefore, that if the proof of the possession of the premises in controversy from January 1, 1889, to December 31, 1897, under the Levi P. and Veta locations had been before the court, it would have been impossible for defendants to have established title thereto by prescription under the Uhlig No. 1 and No. 2 locations. An essential element to the prescriptive title would have been lacking, viz., *exclusive* possession for the statutory period.

Hence the State supreme court, in holding that defendants had title by prescription to the premises in dispute, necessarily based its decision primarily on its construction of section 452, U. S. Rev. Stats. Without such prior construction of the Federal statute the court could not have applied the State statute of limitations, and there would have been nothing whereon to rest the decision as to defendants' prescriptive title. The foundation stone of the whole argument is the interpretation placed on section 452, U. S. Rev. Stats.; the construction of that statute is all-controlling in the case. The contention of opposing counsel that the State supreme court decided this cause "on other than a Federal question" is hence without merit.

In excluding the proof of the Levi P. location the court not only denied the rights specifically claimed by plaintiff under the general grant of section 2319, Rev. Stats., but also denied to him a right distinctly asserted under section 2324, Rev. Stats., authorizing relocation of mining claims. The location of the Yes You Do claim was in express terms a *relocation* of the Levi P. (Rec., 136). The validity of the prior location is a constituent element of a relocation, and the fact and record of the original location constitutes part of the chain of title of the relocated claim. The discovery of the original locator is adopted by the relocator and made the basis of his claim. Proof of the discovery, location, possession, and abandonment or forfeiture of the original claim are hence necessary to establish title under a relocation, and to exclude that proof is to deny the right of relocation.

"A relocation impliedly admits the validity of the prior location. *There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.*"

Lindley on Mines (2d ed.), sec. 404.

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him and claimed by him in order to give validity to the location."

Jupiter Mining Co. vs. Bodie Consol. Mining Co., 7 Saw., 96, 108; 11 Fed. Rep., 666, 676.

The plaintiff in error has therefore specially claimed rights under these two sections of the Federal statutes—sections 2319 and 2324, U. S. Rev. Stats.—in the courts below, and these rights those courts have denied, distinctly basing such denial upon a Federal statute (sec. 452) construed to be in limitation thereof. The case falls squarely within the third clause of section 709, U. S. Rev. Stats., as a "right * * * claimed * * * under a statute of * * * the United States, and the decision is against the * * * right * * * specially set up or claimed," and is hence reviewable here.

IV.

The judgment below should be reversed.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

N. W. SONNEDECKER,
Of Counsel.